IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 467

AYRSHIRE COLLIERIES CORPORATION, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

REPLY BRIEF FOR AYRSHIRE COLLIERIES CORPORATION, ET AL., APPELLANTS.

EARL B. WILKINSON,
ARTHUR R. HALL,
Attorneys for Ayrshire Collieries Corporation, et al., Appellants.

SAMUEL W. WITWER, JR.,
J. ALFRED MORAN,
Of Counsel.

INDEX.

	PAGE
Preliminary statement	1
Argument	9
I. The decision in United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company	9
II. The jurisdiction of the Commission to enter its order in I. & S. Docket No. 5139	11
A. Respecting the existing rates and rate relationships	11
B. Respecting the rates to Beloit via the Southern Railway from Princeton and Boonville and via the single-line of the Milwaukee from Brazil and Linton	20
III. The Commission's conclusion that the present and proposed rates from Indiana are unlawful in violation of Sections 2 and 3 (1) of the Act	21
IV. The Commission's order to remove discrimination and prejudice and preference is invalid because of the lack of effective control by the Milwaukee over the joint-line rates	30
V. The approved rates and rate relationships	35
VI. The determination by only two members of a statutory three-judge District Court	40
Conclusion	43

CITATIONS.

Cases.

Advances in Rates—Western Case, 20 I. C. C. 307, 314 ..... 14, 15

Akron, C. & Y. Ry. Co. v. United States, 22 Fed. (2d) 199, 203 14

Coal to Illinois and Wisconsin, 232 I. C. C. 151..... 5

Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U. S. 212, 218.....41, 42

Eastern Salt Cases, 122 I. C. C. 21 14

Fairbanks-Morse & Co. v. Alton & S. R., 195 I. C. C. 365 38

Interstate Commerce Commission v. Inland Waterways Corporation, 319 U. S. 671, 689 19

Lignite Coal from North Dakota, 126 I. C. C. 243, 244, 245 ..... 14, 15

Naval Stores from Southern Producing Points to Various Destinations, 87 I. C. C. 740, 756; 89 I. C. C. 634 14

Oregon-Washington R. & Nav. Co. v. United States, 47 Fed. (2d) 250 42

Sioux City Terminal Railway Switching, 241 I. C. C. 53, 73, 74 ..... 14, 16

State of Ohio, et al. v. United States, 6 Fed. Supp. 386. 42

Texas & Pacific Ry. Co. v. United States, 289 U. S. 627, 646, 649, 650 ..... 30, 31, 32, 33

United States v. Chicago Heights Trucking Co., 310 U. S. 344 29

United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294 U. S. 499, 504, 509 ..... 9, 11, 12

Virginian Railway Co. v. United States, 272 U. S. 658, 671, 672 42

Western Paper Makers' Chemical Co. v. Director General, 91 I. C. C. 223, 236 14

Western Paper Makers' Chemical Company v. United States, 271 U. S. 268 13

Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476 ..... 31, 32

Statutes.

Urgent Deficiencies Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47) 40, 41

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PRELIMINARY STATEMENT.

The briefs of the appellees, particularly the brief of intervening railroads and Illinois coal operators, The Alton Railroad (Henry A. Gardner, Trustee), et al., Central

Illinois Coal Traffic Bureau and Illinois Coal Traffic Bureau, hereinafter occasionally referred to as "interveners" to distinguish them from the other appellees, the United States and the Interstate Commerce Commission, are largely premised on two fallacies. Throughout their briefs it is stated that by its order of July 9, 1945, in I. & S. Docket No. 5139 the Commission prescribed certain rates to be applied from Indiana mines to Beloit, Wisconsin, Rockford and other destinations in Illinois.

For the convenience of the Court, and to refute the repeated erroneous statements of appellees, we here submit a complete copy of that order (R. 222):

> *"It appearing,* That by order dated July 30, 1942, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order and suspended the operation of all of said schedules until March 2, 1943, and that subsequently respondents have voluntarily postponed the effective date of all of said schedules pending the disposition of this proceeding:
>
> *"It further appearing,* That a full investigation of the matters and things involved has been made; that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and that in said report the Commission has found (1) that the said suspended schedules have not been justified because certain of the proposed rates on bituminous coal from Indiana and Western Kentucky rate groups to points in northern Illinois and to Beloit, Wis., would be unreasonable, unjustly discriminatory, or unduly prejudicial or preferential, as indicated in said report; and (2) that certain of the present rates on bituminous coal from Indiana and western Kentucky rate groups to points in northern Illinois are unjustly discriminatory and unduly prejudicial and preferential in and to the extent indicated in said report.

"*It is ordered*, That the respondents herein be, and they are hereby, notified and required to cancel the proposed schedules in this docket on or before November 16, 1945, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, without prejudice to the establishment of rates on the bases approved in the said report.

"*It is further ordered*, That the said respondents, according as they participate in the transportation, be, and they are hereby, notified and required, on or before November 16, 1945, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, (1) to cease and desist from practicing the unjust discrimination under section 2 of the Interstate Commerce Act and the undue prejudice and preference under section 3 (1) of said act, found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove the said unjust discrimination and undue prejudice and preference.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

Clearly, the foregoing order does not require any specific rate to be published or maintained by any carrier. When read in conjunction with Conclusion No. 1 of the Commission's report (R. 210), the order requires certain relationships in rates from Indiana mines to be maintained, but requiring a relationship in rates to be maintained is not the prescription of a specific rate which the carriers must publish and charge. The relationship of 10 cents per ton Linton over Brazil at Rockford, Illinois, for example, can be maintained whether the Brazil rate is $1.00 or $1.50 per ton.

The further fallacy and impropriety running through

the briefs of appellees are the quotations from the briefs of these appellants before the Commission, in lieu of references to the printed record for the evidence which they contend supports the report and order of the Commission.

The hearing before the Commission covered two proceedings. The issues in those proceedings were different. The report and order in only one of those proceedings is before this Court, namely, I. & S. Docket No. 5139. The order in the other proceeding, Docket No. 28881, is not before this Court. In the latter case the issue was whether the intrastate rates on coal within Illinois to Rockford and other destinations in northern Illinois discriminated against interstate traffic in coal.

These appellants believe and urged the Commission to find that the Illinois intrastate rates on coal shipped to Rockford and the other Illinois destinations discriminated against the interstate rates and shipments of coal from Indiana to those destinations. We introduced substantial evidence to demonstrate that fact. We took the position and argued in our briefs that the Commission could dispose of the case properly by requiring the Illinois rates to be increased under the 13th Section proceeding, Docket No. 28881, and by denying the proposed increases in rates from Indiana in I. & S. Docket No. 5139. Surely the argument of these appellants before the Commission, based upon the issues before the Commission in a case not before this Court, cannot with propriety be used here as a substitute for the evidence necessary to support the order of the Commission here under review.

The impropriety of appellees' attempt to impose an "estoppel by brief" against these appellants is further manifested by the fact that the Commission in its report ignored the evidence submitted by these appellants and

completely rejected the arguments in our briefs. The report shows that Docket No. 28881 was decided on the basis that the Illinois intrastate rates discriminated against the interstate rates from Illinois to Wisconsin and Iowa destinations. Further, not only did the Commission reject the evidence and arguments of these appellants, it rejected its own decision, promulgated six years earlier, involving the identical origins and destinations, where it approved rates from Indiana and Illinois on the basis urged by these appellants in the cases just before the Commission. We refer to the case of *Coal to Illinois and Wisconsin*, I. & S. Docket No. 4368, reported in 232 I. C. C. 151.

The few references to the printed record made by appellees are also apt to be misleading. For example, at pages 50 and 51 of their brief, the Illinois railroad and producer interveners quote a part of the testimony of Witness Kuhls, appearing for the Milwaukee Railroad, to the effect that the other roads in Indiana would have to have the same rates as the Milwaukee if they wanted to move coal to these competitive markets. The complete testimony of the witness on that subject, as it appears at pages 540-542 of the record, is as follows:

> "Q. After the 13th Section case, 23130 was decided, and nothing was done by the Interstate Commerce Commission with respect to the rates to Rockford and Freeport, your line, the Milwaukee, reduced its rate from Brazil-Clinton and Linton-Sullivan to Rockford and Freeport, did it not?
>
> * * * * * *
>
> "The Witness: Yes, we reduced our rates from the two Northern Indiana Groups the same amount as Illinois rates were reduced by order of the Illinois Commerce Commission, 17 cents a ton.
>
> * * * * * *

"Q. And that restored the relationship, so far as your road was concerned, to those destinations, Rockford, Freeport and the others involved as between your Indiana mines and the Illinois groups, did it not?

"A. That is right.

"Q. And was the purpose of that change, Mr. Kuhls, to enable your road to continue to compete for the traffic and the movement of coal from the mines you served in Indiana to those destinations?

"A. Yes, that was our contention.

"Q. You did not contend in the docket there involved that the rates were unduly high and should be reduced, and that the then $1.87 rate, or $1.70 rate which you proposed and put into effect, was necessary in order to reduce your rate to a reasonable maximum rate?

"A. No, we didn't think our rates were higher than the reasonable maximum.

"Q. As a matter of fact, it was the position of the Milwaukee Railroad in that proceeding, was it not, that all of the rates in Illinois and Indiana were too low?

"A. Yes, that was the evidence shown in Docket 23130.

"Q. But was it your opinion then and is it your opinion now that if you are going to transport coal from the mines served by you in Indiana to the Rockford, Freeport and other destinations that it is necessary for you to have the same relationship with Illinois that you enjoyed prior to the disruption by the Illinois reduction in rates?

"A. That is our opinion.

"Q. Now, is there anything peculiar in the service of the Milwaukee that makes it necessary for you to have that relationship that does not apply to the other carriers serving the Brazil-Clinton and Linton-Sullivan Groups in Indiana?

"A. Well, in our court case we showed that we were a single-line railroad from the origins to the destinations and that our mines were located at a lesser distance than the mines on the other railroads.

"Q. Yes, but leaving aside that factor, and I am thinking only of the ability to move freight, whether it is a few miles more or less, the other roads in Indiana, if they are going to move coal in a competitive market must have the same rates as you have, must they not, from the Brazil-Clinton Field?

"A. I think that is axiomatic.

"Q. Now, from your long experience as a traffic manager, coal traffic manager, Mr. Kuhls, and leaving out these items of transportation conditions and statistical research, is there any reason why the Brazil-Clinton Group as a whole, with approximately the same distance to Rockford as Springfield has, four miles less than Springfield, should have a rate 17 cents higher than the rate from the Springfield or Central Illinois Group to Rockford?

"A. Well, there are some things that enter into it which, of course, may not be pertinent; but the other mines may not need these markets to the same extent that the mines on the Milwaukee Railroad do.

• • • • •

"Q. In other words, if they don't need the market and don't ship their coal in there, it doesn't make any difference what their rate is, it is just a paper rate?

"A. That is right.

"Q. But if they are going to participate in that market, they must have comparable rates to those of the Milwaukee?

"A. I think that is true.

"Q. And prior to the disruption of this rate adjustment in 1930 or 1932, when the Illinois Commerce Commission reduced the rates to Rockford and Freeport, the parity between Springfield and Brazil-Clinton, or the relationship of Brazil-Clinton 30 cents under Southern Illinois, had existed for 25 or 30 years, had it not?

"A. Back in 1901 and 1902, yes."

It is clear from the foregoing that the witness was testifying to the issues in Docket No. 28881—that unless rates from Indiana were on a competitive basis with the intrastate rates in Illinois, coal could not be shipped from Indi-

ana to these destinations; that the Milwaukee's rates to Rockford, Freeport and other points on its line were competitive with Illinois rates; that the other carriers serving Brazil and Linton mines would have to publish rates on the same basis as the Milwaukee's if they were to move coal to those destinations in competition with Illinois coal.

Other references in interveners' brief to the evidence are possibly as misleading and improper as the one above analyzed. The quotation of a few words or a sentence, removed from the context of the subject matter involved, may be and frequently is misleading.

We will now proceed to a discussion of the various contentions made in appellees' briefs, following as nearly as possible the subject headings used by them.

ARGUMENT.

I.

The Decision in United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

The Illinois railroad and producer interveners argue under Part I of their brief that this Court, by its decision in the case of *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, has told the Commission it had the power to enter the very kind of order which it has entered in I. & S. Docket No. 5139 and which is now under attack. This is a strange interpretation of the decision in that case.

Interveners start their argument under this heading with a recitation of the reduction by the Milwaukee of its rates in 1932, which were the subject matter of the above cited case, and state (page 20 of their brief) "The reduced single-line rates of the Milwaukee subsequently became effective. Such was the origin of the so-called dual basis of rates from Indiana." There is not one word of evidence in this record to sustain that statement. As pointed out in our original brief, in numerous instances rates from all the origins in a group to a given destination are not the same. This is clearly shown by Exhibits Nos. 27 and 28 (R. 1685-1686), which have been frequently referred to.

In the archives of this Court is the brief filed by the Indiana coal operators in that case. On pages 4 and 5 of that brief are tables showing the then present rates from the Brazil and Linton groups to destinations in northern Illinois, including many of the same destinations shown in Appendix A of the Commission's report in this case. It

there appears that from the Brazil group to Forreston, Byron and Davis Junction, while the rate of the carriers was generally $1.80, the rate of the Pennsylvania was $1.87; and that from the Linton group to five destinations some carriers published one rate and other carriers published another rate. For example, to Byron, the C. & E. I. and the Big Four published a rate of $1.85, and the Monon, Illinois Central and the Pennsylvania published a rate of $1.92.

Since there is no evidence on the subject in this record, it is necessary to go outside of the record to show that the statement contained in interveners' brief is unsupported in fact.

If by the statement in their brief, page 20, that "appellants now urge that the Court's opinion in that case has the effect of holding the dual basis of rates to be lawful and therefore forecloses the Commission from entering any order, such as the one now assailed, holding the dual basis unlawful," interveners mean that we contend that a carrier has the right to initiate and maintain rates which it believes economic, which are within the zone of reasonableness prescribed by the Act and which do not violate any provision of the Act, then that is a correct interpretation of our position.

We do and have argued that the Court's decision in the prior case makes no determination regarding a dual basis of rates. The question involved was the right of the Milwaukee to maintain and publish rates within the zone of reasonableness, a right which it would be deprived of if the Commission could prescribe a flat rate to apply from all origins in a so-called rate group to a given destination via all carriers serving such group.

This Court in the prior decision held that there had been no finding of fact by the Commission supported by evidence that the rates of the Milwaukee violated any provision of

the Act, and ruled that a carrier could initiate and maintain such rates as it deemed advisable so long as such rates did not violate a provision of the Act. It is clear from a reading of the report of the Commission in this case that the finding that the rates of the Milwaukee violated Sections 2 and 3 (1) of the Act was an effort to meet that language of this Court and to remove this case from the ruling of the prior decision.

The statement of this Court that the Commission had the power to curb any disruptive tendencies and to fix proper relationships and proper rates was addressed to the statement of the Commission in the report that to permit the rates of the Milwaukee to become effective would lead to a progressive reduction of rates from other Indiana points of origin and origin groups that would work into Illinois and be an endless circle destroying the whole rate structure in the Middle West. As the Court there said (p. 509):

> "The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds. * * * Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another * * *."

No one questions the power and authority of the Commission so to do. The question presented in this case is, has the Commission instituted or conducted a comprehensive inquiry into the rates of all the carriers? Is there evidence to support the findings and statements made in the report? Is there evidence to support the order of the Commission made in this particular case, not the order it might have made on a proper record in a proceeding in which the issues were clearly defined and under evidence responsive to those issues?

We can only deal here with what the Commission did in

its order in I. & S. Docket No. 5139, *supra*, pp. 2 and 3. We submit the Commission did not conduct a comprehensive inquiry into the rates of all the carriers for the purpose of fixing a fair relationship between one line and another or to build up a structure of rates in the Middle West territory. In I. & S. Docket No. 5139 it conducted an inquiry into the lawfulness only of the new rates contained in certain specific tariff supplements filed with it and recited in its order of investigation and suspension. (R. 141-144.)

The Court in the case cited stated (p. 504):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power."

Other cases have held that such findings must be supported by substantial evidence. Unless the Commission has found facts supported by substantial evidence that the rates of the Milwaukee violate some positive requirement of the Interstate Commerce Act, then it has failed to find the basic or quasi-jurisdictional facts conditioning the power of the Commission to act. The contention of these appellants is that in I. & S. Docket No. 5139 the Commission has failed to find facts, supported by substantial evidence, with respect to any of the rates from any origin in Indiana to any destination in Illinois that constituted a violation of the Act and that therefore it had no power to enter any order with respect thereto.

II.

The Jurisdiction of the Commission to Enter Its Order in I. & S. Docket No. 5139.

A. Respecting the Existing Rates and Rate Relationships.

In Part II of each of appellees' briefs they discuss the subject matter of Point IV of our original brief, pages 62 to 68.

They contend that in I. & S. Docket No. 5139 the Commission could have found the proposed new rates unlawful and could have prescribed specific rates in lieu of the proposed rates, which specific rates would have been different from the existing rates, and that therefore it could enter an order that would affect the present rates. That is not the point.

The point here is that by its order the Commission required the proposed new rates to be cancelled, without prejudice to the establishment of rates on the bases approved; the order did not prescribe specific rates or rate relations, in lieu of the proposed new rates, which the carriers were *required* to publish. After disposing of the entire and only subject that was involved in I. & S. Docket No. 5139, the Commission then proceeded to enter an order requiring changes in existing rates and rate relations that were not before it for investigation. That the Commission did not have the power to do.

As we have pointed out, the Commission's authority under Section 15 (7) of the Act is predicated upon the filing with the Commission of schedules of new rates. The new rates, filed to become effective August 2, 1942, were the only subject before the Commission in I. & S. Docket No. 5139. That is the only inquiry that was ordered by the Commission. It is futile to argue that, if the Commission had entered into some other kind of investigation, some broader investigation would have been conducted involving other issues and the legality of present rates and the Commission would have power to enter such an order. That is not the situation confronting this Court.

Interveners cite, at page 27 of their brief, the case of *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, saying that there this Court upheld an order of the Commission, just like that in this case,

which found unlawful and ordered cancelled rates under suspension and prescribed a new basis of rates for the future. They are in error. The Commission plainly said in its reports there under review that "no order prescribing the rates herein found reasonable will be entered at this time." *Naval Stores from Southern Producing Points to Various Destinations*, 87 I. C. C. 740, 756; 89 I. C. C. 634; *Western Paper Makers' Chemical Co.* v. *Director General*, 91 I. C. C. 223, 236. No order was entered in that case by the Commission compelling the publication of any specific rate or rate relationship. At no point in the proceedings before the Commission, the consideration by the District Court of the application for injunction, or in the appeal to this Court was there raised the question of the Commissioner's authority under Section 15 (7) to require publication of a particular rate or rate relationship.

To the same proposition all appellees cite also the following: *Akron, C. & Y. Ry. Co.* v. *United States*, 22 Fed. (2d) 199, 203; *Advances in Rates—Western Case*, 20 I. C. C. 307, 314; *Lignite Coal From North Dakota*, 126 I. C. C. 243, 244-5; and *Sioux City Terminal Railway Switching*, 241 I. C. C. 53, 73-4.

In *Akron, C. & Y. Ry. Co.* v. *United States, supra*, a three-judge court sitting in the Western District of New York had before it for review the Commission's decision in *Eastern Salt Cases*, I. & S. Docket No. 2440, and related dockets, reported in 122 I. C. C. 21. The Commission concluded in that proceeding, which included two complaint cases along with the investigation and suspension case, that an order should be entered in I. & S. Docket No. 2440 requiring the cancellation of the suspended schedules. The order prescribing reasonable rates for the future was entered in its complaint Dockets Nos. 16695 and 14250, heard in conjunction with I. & S. Docket No. 2440. The

language quoted from the Court's opinion appearing in appellees' briefs clearly establishes that the District Court's holding, that the Commission had power to increase or decrease existing rates, rested on the Commission's authority under Section 15 (1).

In *Advances in Rates—Western Case*, 20 I. C. C. 307, the increased rates on some 200 commodities were under voluntary suspension. The Commission concluded that the schedules of increased rates were not justified and asked that the carriers withdraw the proposed tariffs, indicating that if such action was not taken the Commission would further suspend the rates and issue an order directing the maintenance of the present rates. The Commission there made no order requiring, nor did it indicate it would attempt to make any change in the existing rates. The comments of the Commission quoted in appellees' briefs were not relevant to its determination and can hardly be said to establish the proposition of law for which they cite the case.

In *Lignite Coal from North Dakota*, 126 I. C. C. 243, the Commission had before it for rehearing its decision in 89 I. C. C. 726. There the carriers proposed increased rates on lignite from mines in North Dakota to destinations in the Dakotas and Minnesota. In its report the Commission concluded that the schedules under suspension had not been justified and entered an order requiring their cancellation. It concluded, also, that the existing rates were too low, but did not make any order with respect to the existing rates. Instead, the Commission submitted the matter to the parties for the purpose of securing their views as to the proposed rates for the future and asked that they bring to the Commission's attention the conclusions they reached. The carriers were unable to agree and the protestants requested that the case be set down

for further hearing. Accordingly, the case was re-opened and a *hearing was had specifically to determine reasonable rates for the future.* When considered in the light of the fact that the Commission conducted a further hearing specifically to determine reasonable rates for the future, of which all the parties had notice and which necessarily involved changes in existing rates, the language from the decision of the Commission quoted in appellees' briefs is of no weight.

In *Sioux City Terminal Railway Switching*, 241 I. C. C. 53, the Commission had before it not only an investigation and suspension proceeding but a complaint in its Docket No. 27899, specifically alleging that existing practices and charges in connection with the switching services involved were unreasonable and unduly prejudicial. Further, the parties had notice of a hearing concerning, and presented evidence and arguments respecting their various contentions as to, the lawfulness of providing and maintaining private sidings within the plants of some shippers and not others.

Thus, while appellees all contend that in an investigation and suspension proceeding under Section 15 (7) of the Act the Commission has the power to consider the lawfulness of and require changes in existing rates, they do not cite any authority which has so construed Section 15 (7) in a case such as we have here. The casual statement, on page 29 of interveners' brief, that the provisions of the Act "as interpreted for many years by this Court, other federal courts, and the Commission as well," support the proposition for which they contend, does not carry any weight in the absence of citations of the cases to which they refer. The important distinction between the cases cited by appellees and that here is that the Commission did not have before it in the proceeding out of which its

order in I. & S. Docket No. 5139 was issued any complaint alleging unlawfulness in any respect in the existing relationship of the Indiana rates among themselves, nor had it entered on its own motion and without complaint any *order for an investigation into and a hearing concerning the lawfulness of the existing rate relationships from Indiana.*

Appellees argue that the order of investigation entered by the Commission on July 30, 1942, included within its scope an investigation of the lawfulness of the existing rates. We refer again to that order. (R. 141.) The very first sentence thereof reads:

> "*It appearing,* That there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 2nd day of August, 1942, and later, designated as follows: * * *"

Then follows a designation of numerous supplements to certain tariffs of the carriers, involving not the tariffs themselves but the supplements. Then the order proceeds (R. 142):

> "*It is ordered,* That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz.:
>
> The Baltimore and Ohio Railroad Company:
> Supplement No. 42, * * *
>
> Chicago, Burlington & Quincy Railroad Company:
> Supplement No. 38, * * *"

The order then enumerates other tariff supplements and continues (R. 144):

> "And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order."

Later in the order the operation of said schedules contained in said tariffs is suspended. (R. 144.)

As the power to suspend is only to suspend the new rates, it is manifest that all the Commission purported to deal with in its order of July 30, 1942, was the new rates contained in the various tariff supplements first enumerated in that order. The appellees seek to torture that order into an order of hearing regarding the present rates.

Again in this part of their briefs appellees attempt to confuse the Court by quoting from the statement of the witness for these appellants before the Commission. That statement is not that the legality of the existing rates was before the Commission in I. & S. Docket No. 5139. The Court should remember that the proceeding in which the witness was testifying involved also the 13th Section case, Docket No. 28881. The new rates were increases over the present rates. Maintaining that the present rates were not less than reasonable maximum rates was a condition precedent practically to opposing the approval of the proposed new rates which were under suspension. Also, the contention that the present rates from Indiana to these Illinois destinations were not less than reasonable maximum rates, but were really too high, had a direct bearing upon whether or not the intrastate rates within Illinois subjected the Indiana shippers to an undue prejudice and discrimination against interstate commerce. Some of the proposed rates were objected to as creating a discrimination and a part of the quotation goes to that contention.

Appellees again quote from our brief before the Commission to the effect that there was ample evidence upon which the Commission could enter an order which would in effect restore the standard differential adjustment into this portion of Illinois as between the Indiana groups

and the Illinois groups. As heretofore pointed out, that could have been done by the Commission exercising its jurisdiction in Docket No. 28881, to require an increase in the rates within Illinois, and by exercising its jurisdiction in I. & S. Docket No. 5139, to deny any increase in the rates from the Indiana mines to these destinations in Illinois. That statement is far from saying that there was ample evidence in this record to sustain an order requiring the removal of an alleged discrimination or an alleged undue prejudice and preference among the existing rates from origins in Indiana to any destination in Illinois.

Appellees appear to be contending that in the I. & S. Docket No. 5139 proceeding the Commission had before it, and had jurisdiction and authority to act with respect to, all rates, charges, regulations and practices involved in the entire Middle West coal rate structure. Such a contention is, of course, absurd. No carrier or group of carriers would ever propose new rates if by so doing they brought before the Commission for investigation and possible change every rate, charge, regulation and practice set forth in the tariffs to which are filed supplements stating new rates. This Court has before considered and rejected such an interpretation of Section 15 (7), saying in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671, at page 689:

> "The construction contended for would have the result either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15 (7) so rare as to make such powers of little practical significance."

Finally, we repeat, it is our contention that the Commission has ordered a change in existing Indiana rates and rate relations, its *statutory authority* over which *was never invoked*, as plainly required by Section 15 (1) of the Act, by the issuance of an order for investigation and

hearing into the lawfulness of such existing rates and rate relationships. The Commission's action patently is beyond its statutory authority and should be set aside.

B. Respecting the Rates to Beloit Via the Southern Railway from Princeton and Boonville, and Via the Single-Line of the Milwaukee from Brazil and Linton.

Under this heading the appellees argue that the Commission had jurisdiction over the single-line rates of the Milwaukee to Beloit so it could require a change in such rates, although it did not have jurisdiction over the rates of the Southern Railway from the Princeton and Boonville groups to Beloit. Inasmuch as the order of the Commission did not purport to require any change in the existing rates to Beloit, that matter is not argued in our brief.

It is urged in our brief (pp. 87-89) that the action of the Commission in approving the rates to Beloit, shown in Appendices A and D to its report, is arbitrary and capricious, but inasmuch as no rates were ordered into effect there is nothing to enjoin in that respect, except to enjoin the whole report as arbitrary. The Commission in its report recognized the single-line rates of the Milwaukee to Beloit were not before it. (R. 192.)

Appellees have here argued a point not raised by these appellants in their brief.

III.

The Commission's Conclusion That the Present and Proposed Rates From Indiana Are Unlawful in Violation of Sections 2 and 3 (1) of the Act.

The appellees argue under Part III of each of their briefs that the Commission's conclusion that the present and proposed rates from Indiana are unlawful, in violation of Sections 2 and 3(1) of the Act, is supported by substantial evidence and adequate findings. This apparently is in answer to Points II and III of our original brief, pages 32 to 61.

Again appellees have avoided the point of our argument regarding Section 2 of the Act and the failure of the Commission in this case to make findings of facts supported by evidence which constitute a violation of Section 2. The Section prohibits unjust discrimination in the transportation of like commodities under substantially similar circumstances and conditions. The fault of the report is that there is no evidence that coal moving over the direct line of the Milwaukee from a point on its line in the Brazil district and, for example, coal moving from a point on the line of the New York Central in the Brazil district to Rockford, or other destinations in northern Illinois, moves under substantially similar circumstances and conditions. In fact, it negatives the possibility of such a finding because the very origins are different and the circumstances and conditions of transportation must necessarily differ. We also pointed out in our original brief, pages 35 to 39, that this Court and the Commission have over a long period of years held that, to constitute a violation of Section 2 of the Act, shipments at different rates must be between the same termini, the same distances and over the same routes.

Even though there had not been such a definite and

clear interpretation of Section 2 by the Commission and this Court, nevertheless in this case there was no evidence from which the Commission could conclude or find that the circumstances and conditions of contemporaneous transportation of coal from a point on the Milwaukee and a point on one of the other railroads serving origins in the Brazil or Linton groups were substantially similar, because of the complete lack of evidence of any of the circumstances and conditions under which coal or any other traffic might move from an origin on any of those other railroads.

The witness testifying regarding the conditions on the C. & E. I. Railroad, who had heard the complete and detailed description of the circumstances and conditions prevailing on coal moving over the line of the Milwaukee, stated that he could not compare the operations on the C. & E. I. with the operations on the Milwaukee. (R. 805.) In the absence of evidence of those conditions, other than the length of haul from origin to destinations, it was impossible for the Commission to make any findings that the transportation was performed under substantially similar circumstances and conditions.

At page 43 of interveners' brief reference is made to the record pages 732-778, 802-824 and 1683-1684, for substantial evidence of operating conditions. Remembering that the only question here is discrimination as between origins in Indiana by carriers serving Indiana, we call the Court's attention to the fact that the evidence appearing at record pages 732 to 749, inclusive, is the testimony of Mr. O. E. Pearson who described the operating conditions on the Chicago, Burlington & Quincy Railroad *within Illinois*. That railroad does not serve any Indiana point of origin. When asked about other roads he stated (R. 748) he had no first hand knowledge of the operating conditions on any other railroad in that district.

The evidence from record pages 749 to 777, inclusive,

consists of testimony of Mr. S. F. Lynch regarding the operating conditions on the Illinois Central *from origins in Illinois to destinations in Illinois, Wisconsin and Iowa. He did not mention the operating conditions from mines in Indiana.* At record page 758 the witness said he was confining his testimony to operating conditions on the Illinois Central from districts *within Illinois,* that he was not testifying regarding operating conditions on any other railroad to any point in Illinois and that he could not intelligently testify regarding any other railroad as he had no personal knowledge of the operating conditions on any other railroad.

At record pages 778 to 802, inclusive, is the testimony of Mr. W. J. Whalen, to which we referred in our original brief, pages 13, 14 and 42, regarding operating conditions on the Milwaukee from mines in Indiana to destinations in Illinois and beyond. At record pages 802 to 808, inclusive, is the testimony of Mr. C. H. Fischer, of the C. & E. I. Railroad, to which we refer above and in our original brief, pages 14 and 42, regarding the operating conditions from mines on that line in Illinois and Indiana to Chicago, in the course of which (R. 805) the witness was asked if he heard Witness Whalen's testimony, to which he said yes; and then he was asked if the movement of coal from the Brazil group on the C. & E. I. was comparable with the movement of coal from the same group on the Milwaukee:

> "The Witness: I don't know that Mr. Whalen went into detail to such an extent that I would be furnished the information to enable me to answer your question.
>
> "Q. Then you don't know.
>
> "A. No, I wouldn't answer that."

At record pages 1683-1684, interveners obviously refer to Exhibits Nos. 18 and 19 introduced by Witness Fischer for the C. & E. I. Railroad.

At record pages 808 to 824, inclusive, Witness Charles

H. Longman testified regarding the operating conditions *within Illinois*, and to Iowa and Wisconsin on the Chicago & North Western Railroad.

That constitutes what interveners term substantial evidence of operating conditions affecting the movement of coal from various groups in Indiana to destinations in Illinois. We, frankly, question the propriety of interveners' reference to record pages 732 to 778 and 808 to 824 as evidence to support the Commission's finding "that transportation conditions over the Milwaukee's single-line routes were substantially similar to these obtaining over joint-line routes," when they know there is not one word of testimony or evidence in these pages of the record regarding the operating conditions via any carrier from any Indiana origin point.

The brief of the Government and the Commission may not contain such blind references to the record for evidence that is not there, but their brief is nonetheless wanting in any reference to or discussion of *evidence of record* to support the Commission's order. Their brief is indeed unique in that they consistently and throughout the brief cite the Commission's statements in its report as support for the report and order. Certainly, if there is so much evidence in a record of some 2850 transcript pages and 118 odd exhibits to support the Commission's report and order, they should have found it possible and convenient to refer by record page to some of such evidence. We have, we believe, convincingly demonstrated in our original brief and in this reply that there is no support whatever in the record for many of the basic findings and conclusions of the Commission. It is not that there is some, but not sufficient, evidence to support, for example, the Commission's conclusion that the transportation conditions of the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over the joint-line routes

to destinations in northern Illinois, but our contention is rather that there simply is no evidence whatever in the record of the transportation conditions over the joint-line routes from any Indiana origin, except possibly the origins on the C. & E. I.

Interveners apparently refuse to acknowledge that there was not one word of evidence anywhere in the record regarding the circumstances and conditions surrounding the transportation of coal from Indiana origins on the Pennsylvania, New York Central, the Monon, B. & O., the Southern Railway, the A. W. & W. or the Indiana Railroad, all of which serve origins in one or more of the so-called coal groups in Indiana.

On what then did the Commission base the statement repeated in appellees' briefs that the transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those of other lines in the same group? There was no evidence whatever on the subject of the operating conditions on the Illinois Central from Indiana origins served by it. If the evidence regarding the C. & E. I. can be treated as something from which the Commission could draw inferences and make comparisons of operating conditions, then we submit that only with respect to the movement via the C. & E. I. could the Commission make any finding of unjust discrimination under Section 2; but it has made a blanket statement wholly unsupported by evidence and it has made an order that is not confined to the rates of the Milwaukee in conjunction with the C. & E. I.

It is no accident that the record contains no evidence of the transportation conditions in moving coal from Indiana mines via any of the many carriers serving them, except the Milwaukee and the C. & E. I. The fact is that the interveners, including the railroad interveners who had the burden of proof before the Commission and the intervening

Illinois producers, offered evidence and proceeded throughout the hearing before the Commission on the theory that the issue was that the Illinois intrastate rates were discriminatory against interstate commerce in coal moving from Illinois to Iowa and Wisconsin. Hence, they confined their proof to transportation and operating conditions within Illinois and from Illinois to Iowa and Wisconsin. It is nowhere contended that there was any discrimination in the Indiana rates as between Indiana origins and groups. Had the carriers so conceived the proceeding they would and easily could have offered evidence of the transportation conditions from Indiana. Certainly these appellants would have done so had we any indication that such relationships were in issue. Confronted with the order of the Commission, which interveners would like to sustain because of the obvious competitive advantages they would derive from it, interveners simply are laboring to supply what they know to be a fatal lack of evidence in the record to support the Commission's conclusion of and order to remove discrimination under Section 2.

In Part III of the brief of the Government and the Commission it is stated:

> "As to the point made that the mines within a group are not the same origin points, it seems evident that the Milwaukee cannot consistently, for certain of its rates, treat the mines in a group as different origins and, at the same time, for others of its rates, treat such mines as one origin point. The Milwaukee, while insisting for purposes of its single-line rates that the mines in the Brazil and Linton groups are distinct origin points, is, nevertheless, party to the group, or joint-line, rates which treat all the mines in the respective groups as one origin."

This is a misstatement of the facts and might mislead the Court. The Milwaukee in its tariff publishes rates from origins in its Brazil group and also the origins in its

Clinton group. The C. & E. I. publishes rates from its Brazil group and lists the origins to which those rates apply. The Milwaukee joins in some of the rates so published by the C. & E. I. The Pennsylvania publishes rates from certain mines in the vicinity of Brazil and Terre Haute and publishes the same rates from several mines. The Milwaukee joins with the Pennsylvania in the publication of some of those rates.

In other words, each carrier publishes rates from origins on its line. There is not one tariff in which all carriers join in publishing a group rate or group rates. It is the individual action of each carrier, and each carrier treats each of the origin points as a separate and distinct point on its line, as it is, but merely provides that from certain of those origins the same rate will apply to a given destination.

As stated by the Government, one would gather that there was but one tariff in which all the lines published a group rate to Rockford, Beloit or any other point. This is incorrect.

Again under this point interveners quote from our brief in support of the exceptions to the Examiner's report, which brief dealt with, as shown by the context of the exceptions, the general operating conditions in Illinois and from Indiana to Illinois. As shown in the testimony of Mr. Whalen (R. 798-800), he thought the conditions from Indiana over the Milwaukee to these destinations were slightly better than the conditions prevailing on the C. B. & Q. and about the same as the conditions within Illinois via the Illinois Central. That justifies the statement in a Section 13 proceeding that as between the principal carriers serving Indiana and Illinois the operating conditions are substantially similar. The exhibits of the C. & E. I. show curves similar to those of the Illinois Central, but that does not establish that the operating condi-

tions from mines on the Pennsylvania or the New York Central, in the Brazil district, or on the B. & O., the Monon or the C. & E. I., in the Linton district, to Rockford are the same as those via the single-line of the Milwaukee; nor does the testimony of Mr. Scott quoted on page 44 of interveners' brief that in general the transportation conditions from Indiana were similar to those from Illinois.

In view of the absence of any reference to any evidence that would sustain the Commission's conclusion that the Indiana rates violate either Section 2 or Section 3(1) of the Act, interveners content themselves with further quotations from our brief before the Commission on operating conditions, Mr. Scott's statement in the record as to the position of the Indiana producers regarding the proposed rates (R. 1060), and to statements by Mr. Kuhls, witness for the Milwaukee, to the effect that if the other roads serving Indiana origins did not publish a basis of rates the same as the Milwaukee's to these destinations, so as to compete with the Illinois intrastate coal rates, they could not expect to move traffic.

We have pointed out in our preliminary statement that the partial quotations from the testimony and statements of these witnesses is apt to be misleading. Interveners say that Mr. Kuhls testified that he did not see why there should not be one rate via all routes from each of the groups in Indiana to each of the destinations in Illinois. The fact that Mr. Kuhls could not see any reason why the other carriers should not publish rates on a basis that would meet competition from Illinois is certainly no basis for condemning the rates of the Milwaukee.

We submit and urge that nowhere in appellees' briefs on the subject of evidence and findings of the Commission have they pointed to any evidence of record that would

sustain the conclusion that the rates from Indiana violate Sections 2 or 3 (1) of the Act.

It seems strange that the competitors of Indiana coal operators, *i.e.*, the coal producers of Illinois, represented by the Central Illinois Coal Traffic Bureau and the Illinois Coal Traffic Bureau, feel impelled to support an order to remove discrimination in the existing Indiana rates as between Indiana shippers when those Indiana shippers, the appellants in this case, point out there is no discrimination and no undue prejudice or preference in those rates and that they have never so complained to the Commission. The intervening railroads, who also zealously support this order of the Commission, do not serve Indiana but are railroads that serve mines in Illinois, except the C. & E. I. and the Illinois Central, and the principal interest of those railroads is the serving of Illinois mines, not Indiana mines. (R. 1685-1686.)

At pages 47 and 48 of their brief the Illinois railroad and producer appellees say, in effect, that *United States* v. *Chicago Heights Trucking Company*, 310 U. S. 344, is an answer to all our contentions; but they so confuse our contentions as to make unavoidable their misapplication of that case here. They seem to overlook that our contentions here are *not* that the Commission has acted on uncontradicted evidence presented by other parties in a proceeding initiated by the Commission on its own motion and without complaint, but that, quite different from the contentions dealt with in the *Chicago Heights Trucking Company* case, we urge there is no evidence whatever to support the basic and essential findings and that the Commission has not here ordered an investigation into the lawfulness of the relationships among the existing Indiana rates, either upon complaint or on its own motion without complaint. In the *Chicago Heights Trucking Company* case this Court was dealing with a matter of discrimination inherent in differ-

ing charges for identical services, the only difference being that in one instance the shipper was a freight forwarder and in the other any shipper generally. That certainly is not the situation here involved in the Commission's finding of a Section 3 (1) violation to support which, we believe, we have amply demonstrated, at pages 45 to 61 of our original brief, there must be some evidence of and a specific finding that the existing Indiana rates are a source of detriment to some origin or district in Indiana and an advantage to another origin or district.

IV.

The Commission's Order to Remove Discrimination and Prejudice and Preference Is Invalid Because of the Lack of Effective Control By the Milwaukee Over the Joint-Line Rates.

Under Part IV of each of their briefs the appellees argue that the Commission's order is not invalid, because of the lack of effective control on the part of the Milwaukee over the higher joint-line rates of other carriers serving origin points in the Brazil and Linton groups or origins in the Princeton and Boonville groups.

This part of appellees' argument obviously is based upon a misconception of the Commission's order. They argue that the order was entered under Section 15(1) and not under Section 3(1), and therefore it was not necessary to afford an alternative. Appellees quote a footnote from the opinion of the Court in the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 650, referring to the statement of the Court that "Where an order is made under § 3 an alternative must be afforded." The footnote reads:

> "This is not true of an order pursuant to § 15(1), prescribing maximum or minimum or maximum and

minimum rates; but the present orders were not issued under that section."

They say this is a complete answer to our contention. That is not so.

Pursuant to Section 15(1), the Commission may prescribe minimum or maximum or maximum and minimum rates. But the order here involved was not issued under that section. Certainly the language of the Commission's report and order shows that the Commission did not think it was acting pursuant to Section 15(1). The order (*supra*, pp. 2 and 3) recites that the carriers shall "cease and desist from practicing * * * undue prejudice and preference *under Section 3(1)* * * * and apply rates and charges which will avoid and remove said undue prejudice and preference." (Emphasis supplied.) The order does not prescribe a particular rate or rates which shall be made and observed either as minima or maxima in order to remove the alleged prejudice and preference. Further, in Conclusion No. 1 of its report (R. 210), the Commission plainly says that the rates are "in violation of Section 3(1) of the Act * * * to the extent that such rates reflect * * * rate relations * * * which differ from the relations reflected by the rates * * * set forth as approved in this report * * *." That the Commission has here prescribed a *relationship of rates*, as distinguished from a particular rate, which it seeks to compel carriers to publish to avoid a violation of Section 3(1) is so plain it hardly warrants further discussion.

When this Court, in the *Texas & Pacific* case, referred to an order entered pursuant to Section 15(1) and, in the later case of *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, referred to an order being entered under Section 15 and not under Section 3, it was dealing with specific rates required by the Commission to avoid

a Section 3(1) violation, not to an order to remove the violation by reducing or eliminating a differential between existing rates. If the facts warrant, the Commission may enter an order requiring a specific rate to cure an instance of undue prejudice or preference, and it is such an order that is referred to in the *Youngstown* case and the footnote to the *Texas & Pacific* case. But as heretofore pointed out, no specific rates were required by the order in this case, and we again refer the Court to the language of that order appearing in this reply brief, *supra*, pp. 2 and 3.

Furthermore, in our original brief (p. 57) we argued there was no evidence that the Milwaukee exercised any effective control over the rates published by any other carrier serving mines in Indiana. That statement has not been refuted by the briefs of appellees. No evidence has been pointed out that the Milwaukee did exercise such control, that it did so effectively participate in the rates of other carriers serving Indiana that it could control the differences between its single-line rates and the rates of such other carriers. That argument is not addressed to any requirement of an alternative in complying with an order of the Commission to remove undue prejudice. It is addressed to the proposition that a specific finding of control of both rates involved, based on evidence of record, is a condition precedent which must exist before the Commission can determine that there is a violation of Section 3(1) of the Act.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at page 646, it is said:

> "Exemption * * * was granted * * * pursuant to a rule which the Commission had consistently followed since its organization; namely, that a carrier may not be held responsible for undue prejudice or preference unless both of the localities affected are upon its

lines, or it effectively participates in the rates to both. * * *"

In the same case it is said, pages 649-650:

> "Where * * * a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other, but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it. * * * Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them."

There being no evidence that the Milwaukee effectively participates in or controls the rates of other carriers serving origins in Indiana to Rockford or other destinations in Illinois, no order to remove the disparity can run against it. The question of an alternative only arises where the Commission has jurisdiction to enter an order to remove the undue preference or prejudice.

At pages 57 to 59 of their brief, intervening Illinois railroads and producers argue that all the railroads serving Brazil and all the railroads serving Linton and all the railroads serving all the mines in Indiana are one group of railroads and, therefore, the Commission can say that as a group they are all guilty of violating Section 3(1) because the Milwaukee, in order to compete with the Illinois rates, maintains a rate under which coal can move from Indiana to Rockford. This is a far carry. Such a doctrine would completely annul the decisions of this Court that a carrier, within the limitations of not violating

any section of the Act, has the alternative to publish and maintain such rates as it deems advisable. It would annul the decisions of this Court that a carrier cannot be held responsible for a difference in rates unless it effectively controls both rates. The Milwaukee desires to continue its lower single-line rates, because it knows that only on such rates can the mines in the Brazil and Linton groups compete with Illinois mines at Rockford and northern Illinois destinations. Other carriers serving those groups do not care to make it possible for the mines on their lines to compete in these markets with Illinois coal. The Milwaukee has stood willing to join with these other carriers in joint-line rates on the same basis as its single-line rates. They decline to do so. If the Milwaukee so effectively controls the higher joint-line rates from origins on other carriers in the Brazil and Linton groups that it can be held responsible for an alleged violation of Section 3(1) resulting from such a situation, we invite the appellees to demonstrate to this Court how and by what means the Milwaukee can compel the Pennsylvania, the New York Central, the B. & O., or any other carrier serving these groups to join with it in joint-line rates at the level of its single-line rates or anywhere between its single-line rates and the existing higher rates of the other carriers. Yet the order requires the single-line rates of the Milwaukee and the joint-line rates of the other carriers to be on the same level, though not necessarily the same as the existing or approved joint-line rates. And it would not remedy the situation for the Milwaukee to withdraw from all participation in the joint-line rates as the disparity for which the Milwaukee is blamed would still exist. That the appellees have not attempted to reply to this challenge, as indeed they cannot, is the most convincing possible demonstration that the Milwaukee does

not so control the situation that a valid Section 3(1) finding can be made against it.

Appellees urge also that a complete answer to appellants' contention is that whether or not the Milwaukee exercises control is a question of fact and on this the Commission has spoken, both in its report and order, and that "the Commission's finding, on a factual matter entrusted to it for determination, being adequately supported by the evidence," should not be disturbed by this Court. The deficiency in the argument of appellees is the failure to point out one word of evidence that the Milwaukee has any control over the rates of the other carriers serving Indiana mines. The Commission's finding on a factual matter, when there is no fact or evidence or testimony in the record to support such a finding, is a nullity and not binding upon this Court. Certainly appellees do not wish to appear to urge that this Court may not look at the record to determine whether the Commission's finding has some support in the evidence. The cases they cite do not so hold. They would assist the Court and perhaps more effectually meet the contentions of appellants if they would but point to the pages of the record where such evidence appears.

V.

The Approved Rates and Rate Relationships.

Under Part III of the brief of the Government and the Commission and Part V of the brief of the Illinois railroads and producers, appellees all argue that there is substantial evidence to support the prescription of the relationships reflected by the rates set forth in the report as approved rates, and that the action of the Commission approving such rates is logical and rational. They en-

deavor to spell out the reasoning process of the Commission in reaching the conclusion that the approved rates are proper.

Nowhere do they point to the record page for any evidence to sustain their argument. In this portion of their brief the Illinois railroad and producer interveners commit the same error as the Government and the Commission pursued throughout their brief, namely, that of citing the Commission's report in lieu of record evidence. Every single record reference in this part of interveners' brief to support fact findings and statements, save the footnote on page 67, is to those pages of the record where the Commission's report is set forth. We have arrived at an unusual development in the law on review of administrative determinations when reference merely to the statements of the Commission in its report supplies the necessary evidentiary support for the report and order and precludes this Court on review from looking further.

Again they quote from our briefs before the Commission to the effect that in a group or differential adjustment the whole body of the adjustment must be considered, not individual rates. The fault with the Commission's report is that it has not treated the situation presented in I. & S. Docket No. 5139, or in Docket No. 28881, as a group or differential adjustment. The rates to Wisconsin, Iowa and Minnesota illustrate what a group or differential adjustment is, *i.e.*, to every destination the differential relationships between predominant rates from two given groups are identical. As shown by the evidence here, to points in Wisconsin, northeastern Iowa and southeastern Minnesota the rates from the Brazil group to every point are 30 cents per ton under Southern Illinois and on a parity with the rates from the Springfield group in Illinois. (Exs. Nos. 48 and 49; R. 1689.) To each of these

destinations in the territory shown in the map, Exhibit No. 48, the Indiana groups are on the basis of their standard differentials, Linton 10 cents over Brazil, Princeton 17 cents over Brazil and Boonville 20 cents over Brazil. This is so irrespective of variations in the difference in distance between Brazil and Southern Illinois. The evidence further shows that to all of these destinations the Brazil rate is the same as the Springfield rate.

Where that situation exists there is truly a group and differential adjustment. But to the northern Illinois destinations involved in this proceeding the Commission approves rates that are not on a group and differential basis, in that among the twelve so-called representative destinations it has fixed five different relationships. It has arbitrarily approved rates to each individual point, without one word as to why those specific rates are approved, and then it has averaged those rates from each group to the twelve points to make those comparisons. It should be kept in mind that these twelve points were handpicked by the Illinois operators and the railroads serving Illinois. By making a high rate from Indiana to Rockford, where there is business, and a relatively low rate from Indiana to Rochelle, where there is but little business, and averaging the two, it is possible to arrive at comparable averages with the rates from Illinois. The Government and the Commission point to the low rates from Brazil to Forreston and Sterling, in relation to the rates from Springfield. We readily concede, as we have said before, that the approved rates from Indiana to Amboy, Byron, Forreston, Polo, Rochelle and Sterling, which are relatively unimportant markets for coal, are relatively too low when compared to the rates from Illinois. Likewise the approved Indiana rates to Rockford, Freeport, DeKalb, Geneva and Belvidere, which are the most important markets for coal in the territory involved

in this case, are too high. Averaging such rates to all these destinations does not establish that the approved rates to any such destination are proper. Since the Commission has not treated these destinations as a group and differential adjustment we ask simply that the rates to each desination from each group be fair and reasonable.

Interveners quote from the report of the Commission that comparisons based on distance cannot be accepted as controlling, but nothing appears as to what the Commission did consider as controlling. There is not one word in the report as to why the Commission deems proper a rate of $1.89 from Brazil to Dixon for an average haul of 257 miles and also considers a rate of $2.07 proper for a haul from the Brazil group to Rockford for an average distance of 251 miles. (R. 214, 216.) Why the Commission considers proper a Brazil rate to Byron of $1.95 for a haul of 248 miles and a rate of $1.89 for a haul to Amboy of 246 miles is wholly unexplained. (R. 213.) Why the Commission should consider proper a rate of $1.89 from Brazil to Sterling for 287 miles and a rate to Freeport of $2.07 for 287 miles is not explained in the report. (R. 214, 215.)

When rates are established in a logical manner under a group and differential adjustment, the rate is fixed from the base group, Southern Illinois, and the differential is then applied to that base group. This is what was done at Beloit several years ago. The Commission required that the rates to Beloit from Illinois, Indiana and Western Kentucky should not exceed by more than 25 cents a ton the rates from Rockford. *Fairbanks-Morse & Co.* v. *Alton & S. R.*, 195 I.C.C. 365. The rate from Southern Illinois was established at 25 cents a ton over the rate to Rockford and then all the rates from all the other groups in Illinois, Indiana and Western Kentucky were made on their standard differentials over or under Southern Illinois.

That procedure is not followed by the Commission in this case; nor has it used any other base group. The relationships that result are the happenstance of the application of arbitrary rates fixed to each destination, so far as the relationship between the Indiana groups and the Illinois groups are concerned. However, the relationship between the Illinois and Indiana groups is not a subject matter involved in this appeal. We point out the idiosyncrasies of the approved rates and the lack of evidence or reasoning to support those rates for the purpose of showing that the report and order of the Commission are arbitrary and capricious.

Appellees in their brief state that the Commission considers the differences in competitive conditions as reflected in the figures of production from the various origin groups in Illinois and Indiana. As we have pointed out in our original brief, we believe the Commission was influenced by these figures. Those figures show that the Southern Illinois operators, and Illinois generally, had suffered substantial reductions in their shipments to all destinations since 1923, that in 1941 Illinois shipments to all destinations were but 61 per cent of its shipments in 1923, whereas Indiana shipments to all destinations were 94 per cent of the shipments for 1923. Notwithstanding the fact that Exhibit No. 99 shows that to this territory Illinois was shipping coal at the rate of five cars for one from Indiana, and that in 1941 Indiana shipped but 51,000 tons of coal to the six destinations shown, other than Rockford, the Commission must have realized that the rates it approved would prevent any shipments from Indiana to this territory and would exclude Indiana coal from Rockford as effectively as it had excluded it from the other six destinations. This, as shown in our original brief, is beyond the power of the Commission. It is an attempt to allocate markets by means of the manipulation of freight rates.

The sum and substance of the approved rates is to deprive Indiana of the markets at Rockford and Beloit, which two cities consume more coal, as shown by Exhibit No. 4, Part VIII, than the other six destinations in Illinois combined. (R. 1676-1677.) In 1941, Beloit used over 75,000 tons and Rockford 278,000 tons from Illinois. In 1941, Beloit used 51,000 tons of coal from Indiana and Rockford 211,000 tons. Of the destinations shown in Exhibit No. 4, Part VIII, page 1, Rockford and Beloit used 260,000 tons of the 362,000 tons shipped by Indiana, and these are the markets that would be taken from Indiana and handed to Illinois by the rates approved in the report.

VI.

The Determination By Only Two Members of a Statutory Three-Judge District Court.

Only the appellees, the Government and the Commission, argue in their brief in opposition to the contention made in Part I of our original brief, pages 28-37, that two members of a statutory three-judge Court convened under the provisions of U. S. Code, Title 28, Section 47, to consider an application for an injunction, suspending or setting aside an order of the Interstate Commerce Commission, cannot determine the same when the third member of the Court is unable to and does not participate in such determination. They urge that while the statute plainly requires that in connection with the issuance of restraining orders and interlocutory injunctions the application "shall be heard and determined by three judges," there is "little warrant or urgent need for a like rigid restriction in cases on decisions on final hearing."

The statute provides in unmistakable language, however, that "upon the final hearing of any suit brought to

suspend * * * any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply" as in the case of the hearing on the application for an interlocutory injunction. If, as they contend, such requirements are rigid and are inclined to delay "court review of the Commission's rate and transportation orders," the remedy would seem to lie in the Congress which has imposed such restrictions in words so plain as not to permit of any other construction than that which we press before this Court.

They state in their brief, "The Government and the Commission are not, of course, contending that two judges may sit to hear a cause under either Section 266 or the Urgent Deficiencies Act." That is an admission the provision that the "application shall be heard * * * by three judges" applies upon final hearing, while contending that the provision "shall be * * * determined by three judges" does not. Such an interpretation of the statute is, of course, absurd. While we do not urge that the three judges shall be unanimous in their views, nevertheless, the three judges must both hear the application and participate in the determination of it.

Notwithstanding that in *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 U. S. 212, as we point out in our original brief, page 30, the Court had before it only a motion to set aside an order of supersedeas and injunction entered by one member of the three-judge Court, this Court there considered fully the provisions of Section 266 of the Judicial Code, which are substantially the same as the provisions of the Urgent Deficiencies Act here involved, and concluded, at page 218:

> "*Compliance with the statute requires the assent of the three judges given after the application is made* evidenced by their signatures or an announce-

> ment in open court with three judges sitting followed by a formal order tested as they direct. * * * *We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the motion to set it aside as void and made without jurisdiction.*" (Emphasis supplied.)

We think the case controlling here.

Appellees need not have devoted so much effort to a discussion of *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 672. We cited that case at page 31 of our original brief solely for the proposition that the provisions of Section 266 of the Judicial Code, considered by this Court in the *Cumberland* case, are substantially the same as the provisions of the Urgent Deficiencies Act of October 22, 1913, with which we are here concerned. This Court said at pages 671-2:

> "The language of § 266 * * * is substantially the same as that employed in the Act of October 22, 1913. The two statutes are *in pari materia.*"

Appellees cite *State of Ohio, et al.* v. *United States*, 6 Fed. Supp. 386 (affirmed 292 U. S. 498), and *Oregon-Washington R. & Nav. Co.* v. *United States*, 47 Fed. (2d) 250 (affirmed 288 U. S. 14). The cases clearly support the construction of the statute we urge.

In *State of Ohio, et al.* v. *United States, supra*, the three judges comprising the Court apparently conferred and determined the cause before the death of the judge assigned to write the opinion. The participation of the deceased judge in the determination was established by the opinion written by him. The opinion was published as concurred in by the two other judges. Here certainly was "the evidence of the participation of the three judges," of which this Court spoke in the *Cumberland* case.

Such a meticulous regard for the requirement of the statute that the cause should be "heard and determined

by three judges" shows conclusively that the judges participating in these cases cited by appellees, as should have Judges Major and Igoe in this case, conceded the correctness of the position we take here as to the application of the statute. Since, admittedly, Judge Evans, one of the members of the duly constituted three-judge Court, did not participate in the determination of the cases before the District Court, we submit the final decree of June 5, 1946, is void and made without jurisdiction.

Conclusion.

For the foregoing reasons and considerations and those stated in our original brief, the final decree of the District Court should be reversed, or declared void as made without jurisdiction, and this cause remanded to the District Court with directions to enter a decree enjoining the order of the Commission of July 9, 1945, except the part thereof requiring the cancellation of the proposed schedules of new rates, and suspending and setting aside the report of the Commission in so far as it purports to approve rates from origins and groups in Indiana and Illinois to Rockford and other destinations in northern Illinois and Beloit, Wisconsin.

Respectfully submitted,

EARL B. WILKINSON,
ARTHUR R. HALL,
Attorneys for Ayrshire Collieries Corporation, et al., Appellants.

SAMUEL W. WITWER, JR.,
J. ALFRED MORAN,
Of Counsel.

April, 1947.